IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 9, 2000 Session

DEBRA S. McDOWELL v. ROBERT A. McDOWELL, JR.

Appeal from the Circuit Court for Williamson County
No. C-5956 Timothy Easter, Judge

No. M2000-00164-COA-R3-CV - Filed May 2, 2001

This appeal involves a post divorce dispute over child support payments. In 1998, the father was ordered to pay the mother child support in the amount of $1,907.00 per month based on the father's earning capacity of $102,000.00 per annum. Defendant father never appealed the order setting child support. Instead, he simply repeatedly failed to pay child support. In 1999, Plaintiff filed a complaint seeking to hold Defendant in contempt for failure to pay child support. Thereafter, Defendant responded by filing a petition to modify child support, alleging an inability to pay based on a significant variance in income. Defendant was held in contempt and the trial court found that a significant variance did not exist. Appellant father presents two issues on appeal: (1) Whether the trial court erred by denying Appellant's petition to reduce his child support obligation, and (2) whether the trial court erred by holding Appellant in civil contempt. We affirm the trial court and award Appellee attorney's fees on appeal.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

WILLIAM B. CAIN, J., delivered the opinion of the court, in which BEN H. CANTRELL, P.J., M.S. and PATRICIA J. COTTRELL, J., joined.

Ernest W. Williams and Dana C. McLendon, III, Franklin, Tennessee, for the appellant, Robert A. McDowell, Jr.

Richard Dance, Nashville, Tennessee, for the appellee, Debra S. McDowell.

OPINION

The parties were divorced on September 15, 1986 on the grounds of irreconcilable differences. On October 1, 1998, Defendant was ordered to pay Plaintiff child support in the amount of $1,907.00 per month based on Defendant's income of $102,000.00 per annum and earning capacity of $8,550.00 per month. At that time, Defendant was employed by Craighead Development LLC and had a real estate license through Hostettler, Neuhaff & Davis. In February 1999, Defendant moved from a commission basis to a salaried position as a full-time project manager over

condominium units for Craighead Development LLC. In 1999, Defendant received $41,125.00 of commission income he earned in 1998.

The Defendant has means of income other than his full-time employment. Defendant's parents established two trusts for him. At one time, Defendant had a power of appointment (a "five by five") that allowed him $5,000.00 or 5% of the trust corpus. Further, the trusts own a home in which Defendant, his current wife, and their daughter live. The annual fair rental value of the home is $20,000.00. The parties dispute the income of Defendant. Adding to the difficulty of the present case, is the fact that Defendant is an admitted gambler. Because of his gambling problem, he does not have a bank account. His current wife maintains a bank account and is responsible for payment of bills and deposits of his income. The Appellant testified:

> Q. Okay. The – now, in connection with answers to interrogatories which you - - which were submitted to you, you tell us that you do not have a checking bank account?
> A. That's - - yes.
> Q. And you don't have a savings account?
> A. Yes.
> Q. And you don't have any other type of money account, CDs or anything else, correct?
> A. Correct.
> Q. You, likewise, tell us that you don't have any records of your transactions. At least that's what you told us about a year ago, in September; is that correct?
> A. Records of - - I mean - - I mean, I have copies of cashier's checks, when I get cashier's checks. I don't have an ongoing checking account balance statement. But I'll use money orders and cashier's checks and keep the stubs.
>
> . . . .
>
> Q. Do you have any checking account or savings account, either one?
> A. No, sir.
> Q. Do you have an ATM card in your name?
> A. No, sir.
> Q. Do you have a credit card in your name?
> A. No, sir.
> Q. Do you have a certificate of deposit in any bank or company, trust company or anything?
> A. No, sir.
> Q. Why not?
> A. Because I'm a compulsive gambler.

On September 9, 1999, Plaintiff filed a Complaint for Contempt in the Circuit Court for Williamson County asserting that Defendant was in contempt of court because he "failed and/or refused to pay" child support.

On September 17, 1999, Defendant filed a Petition to Modify Final Decree asserting that there was "[a] substantial and material change of circumstances and a significant variance" in his income that justified a reduction in the amount of child support.

The parties dispute Defendant's income for 1999. Appellee testified that she believes Appellant is hiding money through his current wife. A hearing was held on December 6, 1999.

On December 9, 1999, the trial court entered a final order stating:

> [A]fter hearing the testimony of the parties, their witnesses, examining the exhibits and the entire record in this case, the Court finds that there is not a significant variance in Defendant's present income from that amount of Defendant's income the Court determined at that hearing memorialized by the order of October 1, 1998, therefore Defendant's Petition to Modify Child Support will be denied, and the Court further finds that the Defendant has had sufficient income as well as the ability to pay the existing child support and that his failure to do so constitutes a willful civil contempt of this Court's order and therefore it is by the Court,
>
> ORDERED, that the Defendant's Petition to modify and decrease the child support be and the same is hereby denied and dismissed; and it is further
>
> . . . .
>
> ORDERED, that the Plaintiff, Debra S. McDowell, have a judgment against the Defendant, Robert A. McDowell, Jr., for the sum of $4,150.51, that being the unpaid balance due under the existing child support order for the months of August, September, October and November, 1999; and it is further
>
> ORDERED, that the Defendant because of his willful contempt of this Court's prior order, for his willful failure to pay child support, and said Defendant is hereby ordered into the immediate custody of the Williamson County Sheriff's Department and incarcerated in the Williamson County Jail until Defendant purges himself of said contempt; and it is further
>
> . . . .
>
> ORDERED, that the Defendant, Robert A. McDowell, Jr., shall pay the cost of this case and Plaintiff's attorneys' fees incurred in connection with above mentioned Complaint and Petition; . . ."

The court released the defendant from confinement upon posting bond in the amount of $5,000.00.

On January 7, 2000, Plaintiff filed a Complaint for Contempt asserting that "the Defendant has not paid the judgment entered December 9, 1999 in favor of Plaintiff for the unpaid child support in the amount of $4,150.51 and the attorney's fees in the amount of $3,500.00." Also on this date, Defendant, Robert A. McDowell, Jr., filed a notice of appeal.

On March 7, 2000 following a February 24, 2000 hearing, the trial court ordered that the defendant post an Appeal Bond in the amount of $10,000.00 on or before March 2, 2000. This order provided "upon the posting of the aforementioned bond on or before the stated date, execution of

the judgment of December 9, 1999 both for the collection of the money and incarceration of the defendant be and the same is stayed. . . ."[1]

Our review of this case is pursuant to Rule 13(d) of the Tennessee Rules of Appellate Procedure, which provide for a *de novo* review upon the record of the trial court's findings of fact, accompanied by a presumption of correctness, unless the evidence preponderates otherwise.

The determinative issue on appeal is whether the trial court erred in the denial of Appellant's petition to modify his child support.

In *Turner v. Turner,* 919 S.W.2d 340 (Tenn. Ct. App. 1995), this Court stated:

> We turn first to the proper standard for determining whether an existing child support order should be modified. Prior to July 1, 1994, trial courts could modify existing child support awards "only upon a showing of a substantial and material change of circumstances." See Tenn.Code Ann. § 36-5-101(a)(1) (1991) (amended 1994). The General Assembly replaced this standard in 1994 by enacting legislation providing that:
>
> > In cases involving child support, upon application of either party, the court shall decree an increase or decrease of such allowance when there is found to be a significant variance, as defined in the child support guidelines . . . between the guidelines and the amount of support currently ordered unless the variance has resulted from a previously court-ordered deviation from the guidelines and the circumstances which caused the deviation have not changed. Tenn. Code Ann. § 36-5-101(a)(1) (Supp.1995).

Turner v. Turner, 919 S.W.2d 340, 342-43 (Tenn. Ct. App. 1995). In accordance with the amended statute, the Department of Human Services promulgated a rule providing in part; "a significant variance shall be at least 15% if the current support is one hundred dollars ($100.00) or greater per month and at least fifteen dollars ($15.00) if the current support is less than $100.00 per month." Tenn. Comp. R. and Regs. r. 1240-2-4-.02(3) 1994.

The court in *Turner* further stated:

> A modification must be made if the existing support obligation varies by fifteen percent or more from the amount that the obligation would be based on the obligor parent's current income. Tenn.Comp.R. & Regs. r. 1240-2-4-.02(3). In cases where

[1]Various contempt pleadings appear to have been filed subsequent to the notice of appeal. Nothing following the notice of appeal has been adjudicated to date. Therefore, the chancellor will address the subsequent filings on remand.

the variance equals or exceeds fifteen percent, the guidelines permit refusing to decrease child support in only two circumstances: (1) when the obligor parent is "willfully or voluntarily unemployed or under-employed" and (2) if the variance results from "a previous decision of a court to deviate from the guidelines and the circumstances which caused the deviation have not changed." Tenn.Comp.R. & Regs. r. 1240-2-4-.02(3). . . .

Determining the amount of the noncustodial parent's income is the most important element of proof in a proceeding to set child support. *Kirchner v. Pritchett*, App. No. 01-A-01-9503-JV-00092, slip op. at 4, 20 T.A.M. 52-19, 10 T.F.L.L. 4-9, 1995 WL 714279 (Tenn. Ct. App. Dec. 6, 1995). . . . The noncustodial parent's income is, in fact, doubly important in a modification proceeding because the child support guidelines require the courts to examine the basis for the current support order and the noncustodial parent's current income.*Id*. at 344.

The record does not support Appellant's argument that a significant variance exists between the amount of his current child support obligation that was set in 1998 based on an income of $102,000.00 and his present income. Appellant bases his position on the argument that the commission income he received in 1999 should not be considered in his 1999 salary to determine if a significant variance exists. He asserts that the commissions income he received in 1999 was actually earned in 1998 so should not be included in his 1999 income.

At the hearing on December 6, 1999, the trial judge stated:

There are actually two issues that are before the Court today. There's the petition for contempt filed by Ms. McDowell back in September, September the 9th; and then, also, the petition to modify the final decree filed by Mr. McDowell on September the 17th of this year.

I'm going to address the petition to modify first; and then the petition for contempt.

I find that the proof established today has failed to establish a substantial and material change of circumstances from the Court's last review of the defendant's income and earning capacity, which was back in October of 1998.

The Court found at that time, the earning capacity and the ability of this defendant was $102,600. And that was a final order entered by this Court, which was not appealed from, and one which this Court begins as its starting point to determine whether or not there has been evidence to support substantial and material change of circumstances to grant petition to modify since that was a final order. And it's from that point forward that this Court considers evidence of income to determine whether

there has been a meritable change. And, therefore, I find that the Court - - the proof as established here today has failed to do that.

. . . .

The proof established here today, the Court finds that pursuant to Exhibits #13 and #15, that this defendant had income - - or has to date, anyway - - had income of $41,125.21 from Hostettler, Neuhaff, and Davis. Exhibit #15 establishes income to date of $31,583.92; and , also, a benefit of $20,000 for the use of this house that is being provided by the trust, which totals $92,709.13, which is the number that the Court is looking at as a beginning point to see if the proof has established the evidence to find the material change, substantial and material change of circumstances.

Based on the $102,600 figure that we began from, the 15 percent deviation would require a finding of at least $15,390 difference. And finding that the proof today has established income to date, which we still aren't through with 1999, of $92,709, I find that Mr. McDowell has failed to establish that there is at least a 15 percent deviation, and - - which would knock us down to somewhere in the range of $82,000, from the $102,600. And the proof, as I've already stated, has established income of $92,709 to date.

I, therefore, deny the petition for modification and assess the costs to Mr. McDowell.

The trial court was correct in including the commissions earned in 1998 but not paid to Appellant until 1999. Accordingly, the denial of Appellant's petition for modification of his child support is affirmed.

We next address the contempt issue. The judgment under review is for civil contempt. At the hearing on December 6, 1999, the trial judge stated:

[T]he Court finds, based upon the proof that has been established here today, that this defendant's ability to pay and ability to earn, it has not changed from its October 1998 order; that he is currently, I believe, based upon the proof, has the ability to still earn that capacity and, in fact, based upon the proof that's been established here today is on track to be somewhere in that range by the end of 1999.

So I do find that he does have the ability to pay and has the ability to earn. And that if - - if he pursues the efforts that he needs to, and he has the ability to, he should earn that amount.

I do find that his failure to pay the amounts in arrearage is a willful contempt of court. And I find, additionally, that - - that this is a matter of civil contempt for which he has failed to follow the rules of the Court willfully.

We find that the trial court did not err in holding Appellant in civil contempt. "Appellate courts review a trial court's decision to impose contempt sanctions using the more relaxed 'abuse of discretion' standard of review." *Sanders v. Sanders*, No. 01A01-9601-GS-00021, 1997 WL 15228, *3 (Tenn.Ct.App. 1997) (citing *Hawk v. Hawk*, 855 S.W.2d 573, 583 (Tenn.1993)).

Finally, Appellee asserts that we should find this appeal frivolous as defined by Tennessee Code Annotated section 27-1-122. This appeal is not frivolous, but we do find that appellee is entitled to attorney's fees on this appeal. "This court has the authority to award attorney fees for legal services rendered on appeal." *Moore v. Moore*, No. M1999-01680-COA-R3-CV, 1999 WL 1128853 at *9 (Tenn. Ct. App. 1999) (citing *Seaton v. Seaton*, 516 S.W.2d 91 (Tenn.1974)). *See also* T.C.A. § 36-5-101(2000 Supp.). We remand to the trial court for a determination of the amount of attorney's fees. Costs are taxed to Defendant/Appellant.

_____

WILLIAM B. CAIN, JUDGE